

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 8TH MARCH 2007 / 17TH PHALGUNA 1928

OP.No. 18238 of 2002 (U)

PETITIONER:

VENUGOPAL K.R., JAYANIVAS,
RAVIPURAM, KOCHI-16.

BY ADV. SRI.A.V.XAVIER
SMT.THUSHARA JAMES
SRI.JOLLY JOHN. K

RESPONDENTS:

1. DEPUTY LABOUR COMMISSIONER,
AUTHORITY UNDER THE KERALA PAYMENT OF SUBSISTANCE
ALLOWANCE ACT, CIVIL STATION, KAKKANAD, ERNAKULAM.

2. POLAR INTERNATIONAL LTD., 43/1348.
ST.BENEDICT ROAD, COCHIN-18.

BY ADV. SRI.V.T.JOY
SRI.PAULSON C.VARGHESE
GOVERNMENT PLEADER SHRI.RAVIKRISHNAN.

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD
ON 08/03/2007, THE COURT ON 08/03/2007 DELIVERED THE
FOLLOWING:

O.P.No. 18238/2002

APPENDIX

PETITIONER'S EXHIBITS:

- P1. COPY OF THE APPOINTMENT ORDER OF THE PETITIONER.
- P2. COPY OF THE ORDER OF SUSPENSION.
- P3. COPY OF THE ORDER DTD.8.5.2002 OF R1 IN SAC 29/92 AND 1/93.

sdk+

///True copy///

P.A. to Judge.

S.SIRI JAGAN, J.

=====

O.P.No.18238 of 2002

=====

Dated this the 8th day of March, 2007

J U D G M E N T

The applicant in a Subsistence Allowance Application is the petitioner herein. He has approached this court having been failed to obtain favourable orders from the authority under the Kerala Payment of Subsistence Allowance Act, in the application. By Ext.P3 order, the 1st respondent held that the petitioner who was the Branch Accountant of the 2nd respondent company was employed in a managerial/administrative capacity and therefore is not an employee as defined under the Kerala Payment of Subsistence Allowance Act, 1972. Ext.P3 order is under challenge in this original petition.

2. The contention of the petitioner is that he was appointed as a Branch Accountant only by Ext.P1 appointment order. The appointment order contains the conditions of his service. That does not spell out any administrative or managerial

functions to be exercised by him. On the other hand, according to him, he used to discharge the duties that are to be assigned to him from time to time by the employer. The submission of the petitioner is that the 1st respondent on the basis of the fact that when the Branch Manager of the Branch in which he was working as Branch Accountant, was out of station, he used to discharge some functions of the Branch Manager which was cited as the reason for holding that he was in fact exercising managerial/administrative functions. According to him, this was totally an erroneous approach by the 1st respondent authority. He would submit that what is relevant is whether he was employed in a managerial or administrative capacity and what are the duties and the functions attached to the post in which he was appointed, viz., the post of Branch Accountant. He would further submit that the management has not produced any evidence before the authority to show that the functions and duties of the Branch Accountant involved managerial/administrative functions and

therefore, the 1st respondent authority has erred in coming to the conclusion that the petitioner was engaged in a managerial/administrative capacity.

3. On the other hand, the counsel for the 2nd respondent would vehemently support Ext.P3 order. According to him, the management had produced 32 documents which would conclusively go to prove that the petitioner was in fact exercising the functions and duties of a managerial/supervisory nature. He would submit that even while the Branch Manager was present in the branch, the petitioner used to exercise such functions and therefore it must be found that the petitioner was in fact exercising managerial/administrative functions.

4. I have considered the rival contentions in detail.

5. It is not disputed by either side that the Branch Manager, being a person who is having authority in respect of the entire zone of which the Branch in question was part, used to be away from the Branch for the better part of each month. It is also admitted by the petitioner that

during the absence of the Branch Manager, the petitioner was asked to do certain duties and functions which were to be exercised by the Branch Manager in administrative exigency. However, that would not amount to such functions being part of the duties and functions of the Branch Accountant himself. In this connection, the definition of "employee" in the Kerala Payment of Subsistence Allowance Act, 1972, is relevant. Section 2(a) of the Act defines "employee" thus:

(a) "employee" means any person employed in or in connection with the work of any establishment to do skilled, semi-skilled or unskilled manual, supervisory, technical, clerical or any other kind of work for the hire or reward, whether the terms of employment be express or implied, but does not include any such person who is employed mainly in a managerial or an administrative capacity or as an out-worker, that is to say, a person to whom any articles or materials are given out by or on behalf of the employer to be cleaned, washed, altered, ornamented, or repaired by such out worker in any place not under the control and management of the employer."

Going by the definition, in order to hold that an employee is an employee outside the purview of the definition of "employee" under the above said Section, he must have been employed mainly in a managerial or other administration. Here admittedly

the petitioner is employed only as a Branch Accountant. The management has no case that the employment of the petitioner as a Branch Accountant involves mainly managerial or administrative functions. Their only contention is that the petitioner was exercising functions of the Branch Manager, while the Branch Manager was away and the petitioner was also signing documents on behalf of the company, such as tax returns, returns under the ESI Act and some vouchers. Of course the appellant during his examination admitted that there was an S.B. account in his name for carrying out day-today expenses of the company. Unless the management proves that he was in fact carrying out these duties in his capacity as the Branch Accountant, the management cannot successfully contend that the petitioner is employed in a managerial/administrative capacity. Apart from the evidence to show that the petitioner has been signing documents as an authorised signatory of the company and he was exercising some functions of the Branch Manager while he was out of station, there is no evidence

on record to show that such functions were being exercised by the petitioner in his capacity as the Branch Accountant. I am of opinion that unless the management proves that the duties and functions of the Branch Accountant, which the petitioner was, involved administrative or managerial functions, the petitioner cannot be held to be disentitled to claim subsistence allowance on the ground that he is employed mainly in a managerial/administrative capacity.

6. In this connection, I may also refer to a judgment of a learned Single Judge of this court in Dhanalakshmi Bank Ltd. v. Dy.Labour Commissioner (1997 [2] KLT 282), of which paragraphs 5 and 6 are relevant for our purpose, which read thus:

5. The next contention is whether the 3rd respondent will come within the purview of the term "employee" as defined in clause (a) of S.2 of the Act which reads thus:

"Employee" means any person employed in or in connection with the work of any establishment to do skilled, semi-skilled or unskilled manual, supervisory, technical, clerical or any other kind of work for the hire or reward, whether the terms of employment be express or implied, but does not include any such person who is employed mainly in a managerial or an administrative capacity or as an out-worker, that is to say, a person to whom any articles or materials are given out by or on behalf of the

employer to be cleaned, washed, altered, ornamented, or repaired by such out worker in any place not under the control and management of the employer."

(Emphasis supplied)

The above provision indicates that a person who is employed mainly in a managerial or administrative capacity is out of the purview of the definition of the term 'employee'. If the other requirements provided in the definition are satisfied he will be an employee entitled to the benefit available under the Act. In this context, the decision of the Supreme Court in *Arkal Govind Raj Rao v. Ciba Giegy of India Ltd., Bombay* (1985 (2) LLJ 401) is very much relevant. The court said:

"Where an employee has multifarious duties and a question is raised whether he is a workman or someone other than a workman the Court must find out what are the primary and basic duties of the person concerned and if he is incidentally asked to do some other work, may not necessarily be in tune with the basic duties these additional duties cannot change the character and status of the person concerned. In other words, the dominant purpose of employment must be first taken into consideration and the gloss of some additional duties must be rejected while determining the status and character of a person".

It is submitted by the petitioner that the 3rd respondent is an Assistant Manager employed in managerial and administrative capacity. On the other hand, the third respondent points out that he was never put in service as a Manager of the Bank. However he was put in charge as Assistant Manager and in that capacity he had no power to sanction leave to subordinates and to enrol new customers to the accounts. His main duties were ledger posting, canvassing of accounts and remitting cash in other banks. He did not sanction any expenses in connection with the entertainment of customers. In short, he was not employed mainly in the managerial or administrative capacity. He was employed to perform the duties mainly of clerical nature. This is his primary and basis duties and he cannot be treated as a person appointed to perform managerial or administrative duties.

6. Of course, it is true that whenever the 3rd

respondent was put in charge of the Manager he had attended to the duties of the Manager of which sanctioning of leave to the staff is one of them. It does not mean the Assistant Manager had powers to pass vouchers, open new accounts, to sanction leave to subordinate staff and to expend the amounts for conducting the day to day business of the Bank. While acting in charge of Manager no doubt the third respondent had to perform certain additional duties which might appear to be his basic duties. This gloss of additional duties will have to be rejected while determining the character and nature of the duties in the process of examining whether a person is an 'employee' entitled to the benefits under the Act."

The facts of the above case are on all fours with the facts of this case. I fully agree with the principles laid down in that decision and applying that decision, I must hold that the petitioner cannot be held to be employed mainly in a managerial or administrative capacity. Further, in Madhyamam Daily v. Kerala Union of Working Journalists [2002 (3) 30 (SN) (Case No.41)], another learned Single Judge of this court has held that the first and foremost document to show the designation of an employee is the appointment order. The appointment order would spell out the duties and functions of the employee. Even otherwise, the designation given to an employee cannot determine the nature of duties and functions

to be exercised by him. In this case the management has not even attempted to prove the duties and functions of a Branch Accountant of the 2nd respondent company. On the other hand, they have concentrated on what the petitioner had done while exercising certain functions of the Branch Manager while he was away and while signing certain documents as the authorised signatory of the company. I am afraid that both would not go to prove that he was exercising those functions in his capacity as the Branch Accountant of the 2nd respondent. In the absence of any evidence to show that as a Branch Accountant, he was liable to exercise any administrative or managerial functions it cannot be held that the petitioner was in fact employed mainly in a managerial or administrative capacity. In the above circumstances, I am of opinion that the finding in Ext.P3 to the effect that the petitioner was employed in a managerial/administrative capacity is clearly perverse. Accordingly, Ext.P3 is quashed and the matter is remanded to the 1st respondent for a fresh

decision on the quantum of subsistence allowance due to the petitioner for the period when he was under suspension.

7. The counsel for the 2nd respondent seeks a further chance to prove by adducing evidence that the petitioner was actually functioning in a managerial or administrative capacity. I do not think that the management is entitled to any fresh opportunity because they had all the opportunity to do so before the authorities under the Kerala Payment of subsistence Act. The first respondent shall pass fresh orders in the matter within two months from the date of receipt of a copy of this judgment in accordance with the observations made hereinbefore.

Original petition is allowed as above.

Interlocutory application stands closed.

sdk+

S.SIRI JAGAN, JUDGE

S.SIRI JAGAN, J.

=====

O.P.No.18238 of 2002

=====

J U D G M E N T

8th March, 2007